

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSEPH NATHANIEL NELSON, III,

Defendant-Appellant.

UNPUBLISHED

August 20, 2002

No. 231959

Ingham Circuit Court

LC No. 00-075955-FC

Before: Zahra, P.J., and Hood and Jansen, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to commit murder, MCL 750.83, assault with intent to commit great bodily harm, MCL 750.84, and possession of a firearm during the commission of a felony, MCL 750.227b. He was thereafter sentenced to 10 ½ to 30 years in prison for the conviction of assault with intent to commit murder, 2 to 10 years for the conviction of assault with intent to commit great bodily harm, and the mandatory two-year term for the conviction of felony-firearm. Defendant appeals as of right and we affirm.

Defendant first argues that there was insufficient evidence to sustain his conviction of assault with intent to commit murder. In determining whether sufficient evidence has been presented to sustain a conviction, the appellate court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999), quoting *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992). When reviewing the evidence, we are required to view all factual conflicts in a light favorable to the prosecution. *Id.* Additionally, we are required to draw all reasonable inferences and make credibility choices in support of the jury verdict. *People v Nowack*, 462 Mich 392, 400; 614 NW2d 78 (2000).

The elements of assault with intent to commit murder are: (1) an assault, (2) with an intent to kill, (3) which, if successful, would make the killing murder. *People v Davis*, 216 Mich App 47, 53; 549 NW2d 1 (1996). The incident in this case occurred on May 18, 2000, at about 8:30 p.m. in the city of Lansing. One of the victims, Ricky Spinney, testified that he and his friend, Kip Palmer (the other victim), were sitting on the front porch of a friend's (Elsa) house. Spinney noticed that defendant (whom Spinney had known for about a year and a half) was walking with another person and Elsa pointed out to Spinney that defendant and his friend had their arms in the air and were yelling. Spinney stated that he did not respond to defendant, and

Spinney and Palmer left the house about five to ten minutes later. They left to go to work and Spinney drove a Jeep Cherokee owned by his grandparents. As they were driving away, Spinney saw defendant and his companion near bushes in front of an apartment building. According to Spinney, defendant then “popped out” in the middle of the road, pulled a gun out of his coat pocket, and fired several shots at the vehicle. Spinney testified that defendant pointed the gun at the windshield “straight on with [him].” Spinney put his head down, swerved away, and defendant continued to fire the gun. The first shot hit the windshield, three shots hit the hood of the vehicle, and the fifth shot hit the fender on the passenger’s side.

Kip Palmer testified similarly to that of Spinney’s testimony. Palmer testified that he had never met defendant before. Palmer testified that he and Spinney left the house of Spinney’s friend to go to work and Spinney was driving. Palmer stated that as they were traveling in the Jeep, “some guy cross[ed] the street and started shooting at us.” Palmer did not know the man and did not see his face. Both Palmer and Spinney testified that defendant was about twenty yards away when he began shooting. Palmer also stated that the gun was pointed more toward the driver’s side when defendant shot it. Palmer reiterated that five shots were fired: one hit the windshield near the driver’s side, three hit the hood of the vehicle, and one hit the front fender. Further, both Spinney and Palmer denied that there was any type of confrontation between them and defendant when they were on the front porch and initially saw defendant.

Defendant testified in his own behalf and claimed self-defense as his defense. Defendant stated that he was with his friend, Terrence Alexander, and admitted that he had a gun with him. Defendant testified that he had known Spinney for about three years and that he had never had any problems with Spinney in the past. Defendant and Alexander were walking to a barbecue that evening and they saw Spinney at Elsa’s house. Defendant stated that there was no confrontation between any of them at that time. About five minutes later, defendant again saw Spinney in his vehicle. Defendant testified that as he and Alexander were walking on the sidewalk, Spinney was driving toward them with the two front wheels on the grass. Defendant then ran into the street and the vehicle continued toward him. Defendant ran into a driveway and began to fire his gun at the vehicle. He claimed that he was trying to defend himself and that he “wasn’t really thinking.”

On cross-examination, defendant admitted that there was “a lot of bad blood” between Spinney and Alexander. Terrence Alexander also testified on defendant’s behalf and his version was similar to defendant’s version. Alexander stated that he and defendant had seen Spinney on the front porch of a house and that there was no confrontation between any of the men. About two or three minutes later, Spinney was driving his vehicle toward them on the sidewalk. The vehicle then veered toward defendant when he ran into the street. Defendant then pulled out his gun and fired several shots at Spinney’s vehicle. On cross-examination, Alexander admitted that he and Spinney did not get along and that there had been physical confrontations between the two of them in the past.

A Lansing police officer took photographs of the vehicle immediately after the shooting. The photographs were admitted at trial and showed the one bullet struck the windshield on the driver’s side and three bullets hit the hood of the vehicle at an angle toward the driver’s side of the vehicle.

In this case, there were two conflicting versions of what occurred and it was for the jury to determine matters of credibility, to weigh the evidence, and to decide the factual issues. *Wolfe, supra* at 514-515, quoting *People v Palmer*, 392 Mich 370, 375-376; 220 NW2d 393 (1974). While defendant may have presented evidence to support his theory of self-defense, our task is to review the evidence and draw all reasonable inferences and make credibility choices in favor of the jury verdict. *Nowack, supra* at 400. Taken in a light most favorable to the prosecution, there was sufficient evidence presented for the jury to find that defendant had the requisite intent to kill Spinney based on the evidence that defendant fired the gun directly at Spinney, the first bullet actually hit the windshield on Spinney's side of the vehicle, and the three shots that hit the hood of the vehicle were angled in a direction toward the driver. The jury could reasonably infer that defendant intended to kill Spinney based on this evidence.

To the extent that defendant claims that the jury's verdict is inconsistent because he was convicted of assault with intent to commit murder with regard to Rick Spinney and assault with intent to commit great bodily harm with regard to Kip Palmer, we find that the evidence presented at trial supports the jury's verdict and that the verdict is not inconsistent. As we have stated, there was evidence adduced at trial showing that defendant pointed his gun directly at Spinney, fired it, and hit the windshield on Spinney's side of the vehicle. The three bullet holes in the hood also suggested that the trajectory of the bullets was angled toward Spinney. The final bullet hole was in the front fender on the passenger side. The jury could infer from this evidence that defendant intended to shoot at and kill Spinney, but did not intentionally aim at Palmer to kill him. Therefore, the jury's verdict is not inconsistent.

Accordingly, the trial court did not err in denying defendant's motion for a directed verdict because there was sufficient evidence presented at trial to sustain defendant's conviction of assault with intent to commit murder.

Defendant's second issue is that his minimum sentence of 10 ½ years for the conviction of assault with intent to commit murder violates the principle of proportionality. Because the offense occurred on May 18, 2000, the statutory guidelines apply to defendant's sentence. MCL 769.34(1). The statutory guidelines range for the assault with intent to commit murder conviction is 126 to 210 months. Here, the minimum sentence falls at the lowest end of the guidelines range. On appeal, defendant does not challenge the scoring of the sentencing guidelines, the accuracy of the presentence report, or that the trial court failed to consider substantial and compelling reasons for a downward departure. Consequently, the minimum sentence being within the guidelines range, we must affirm the sentence. MCL 750.34(10).

Affirmed.

/s/ Brian K. Zahra
/s/ Harold Hood
/s/ Kathleen Jansen